Elias Mallouk Realty Corp. *and* **Edwin Weise,** *and* **Local 32B-32J, Service Employees International Union, AFL-CIO[1] and Local 2, New York State Federation of Independent Unions[2], Party in Interest.** Cases 29-CA-8042, 29-CA-8042-2, and 29-CA-8327

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 13, 1982, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Elias Mallouk Realty Corp., Garden City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) Announcing or granting unilateral wage increases or any other unilateral changes in the terms and conditions of employment of its employees in the appropriate bargaining unit described above."

2. Add the following as paragraphs 2(b) and (c), substitute the following paragraph 2(d) for the present paragraph 2(b), and reletter the subsequent paragraph accordingly:

"(b) Withdraw and withhold all recognition from Local 2 as the collective-bargaining representative of its employees in the appropriate bargaining unit described above unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

"(c) Upon request by Local 32B-32J, cancel the unilateral wage increases or any other unilateral changes made in the terms and conditions of employment of its employees in the appropriate bargaining unit described above.

"(d) Post at its place of business in Garden City, New York, and at the 10 apartment buildings it manages in Brooklyn, New York, copies in English and Spanish[46] of the attached notice marked 'Appendix.'[47] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT warn and direct our employees to refrain from becoming or remaining members of Local 32B-32J, Service Employees International Union, AFL-CIO, or from providing any assistance or support to that labor organization.

WE WILL NOT threaten our employees with discharge or loss of employment if they sign a petition in favor of Local 32B-32J, Service Employees International Union, AFL-CIO, or otherwise provide support to it.

WE WILL NOT convene meetings of our employees during work hours on our premises at which we urge and direct our employees to

[1] Herein called Local 32B-32J.

[2] Herein called Local 2.

[3] We have modified the Administrative Law Judge's recommended Order to add provisions requiring that Respondent affirmatively withdraw recognition from Local 2 and that Respondent cancel any unilateral changes in wages or other benefits if requested to do so by Local 32B-32J. Contrary to the Administrative Law Judge's comments in fn. 44 of his Decision, we do not attribute any significance to the fact that Local 32B-32J did not indicate at the hearing or in its brief to the Administrative Law Judge whether it would be interested in requesting that the unilateral changes be revoked; however, our Order should not be construed as requiring Respondent to cancel any wage increase or other improvement in benefits without a request from Local 32B-32J. See *Taft Broadcasting Company, WBRC-TV*, 264 NLRB 185, fn. 6 (1982); *Gardena Buena Ventura, Inc., d/b/a Alondra Nursing Home and Convalescent Hospital*, 242 NLRB 595, fn. 1 (1979); and *Bellingham Frozen Foods, a Division of San Juan Packers*, 237 NLRB 1450, 1467 at fn. 30 (1978). We have also modified the Administrative Law Judge's recommended Order to require that Respondent post the attached notice, which we have modified to conform to our Order, at the 10 buildings where its unit employees actually work as well as its main office in Garden City, New York.

become members of and give support to Local 2, New York State Federation of Independent Unions, or any other labor organization.

WE WILL NOT grant recognition to and bargain with Local 2, New York State Federation of Independent Unions, as the exclusive representative of our employees in the appropriate bargaining unit described below at a time when said labor organization does not represent an uncoerced majority of our employees in said unit and when Local 32B-32J, Service Employees International Union, AFL-CIO, continues to enjoy status as exclusive representative of our employees in said unit.

WE WILL NOT refuse to recognize and bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All superintendents, handymen and porters employed by us at all buildings managed by us in the Borough of Brooklyn, City and State of New York.

WE WILL NOT announce or grant unilateral wage increases or any other unilateral changes in the terms and conditions of employment of our employees in the appropriate bargaining unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL recognize effective from the date beginning April 21, 1979, and, upon request, bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive representative of our employees in the appropriate bargaining unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL withdraw and withhold recognition from Local 2, New York State Federation of Independent Unions, as the collective-bargaining representative of our employees in the appropriate bargaining unit described above unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL, upon a request by Local 32B-32J, Service Employees International Union, AFL-CIO, cancel the unilateral wage increases or any other unilateral changes made in the terms and conditions of employment of our employees in the appropriate bargaining unit described above.

ELIAS MALLOUK REALTY CORP.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: These consolidated cases were heard before me in Brooklyn, New York, on November 16-20 and December 2 and 3, 1981. Upon charges filed by Edwin Weise, an individual, and Local 32B-32J, Service Employees International Union, herein called Local 32B, an amended consolidated complaint in these cases issued against Elias Mallouk Realty Corp., herein called Respondent, on December 2, 1980. Subsequently, during the hearing various amendments were made by motion and granted, further amending the amended consolidated complaint. Also during the hearing, that portion of the amended consolidated complaint alleging the discharge of Weise as a violation of Section 8(a)(1) and (3) of the Act was dismissed on motion made by General Counsel following an adjustment of Weise's claim made between Weise and Respondent.[1] The General Counsel alleges that Respondent warned and directed its employees to refrain from becoming or remaining members of Local 32B, threatened its employees with discharge if they signed a petition in favor of Local 32B, convened meetings of its employees during work hours on its premises at which it urged its employees to become members of and give support to Local 2, New York Federation of Independent Unions, herein called Local 2, thereafter unilaterlly changed existing wage rates and other terms and conditions of employment of its employees in a unit in which Local 32B had been exclusive bargaining representative and in which a collective-bargaining agreement had just expired, negotiated in bad faith with Local 32B with no intention of reaching agreement, and granted recognition to and bargained with Local 2 as exclusive bargaining representative of its employees in the same unit, in violation of Section 8(a)(1), (2), and (5) of the Act.

Respondent denied the commission of any unfair labor practices.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the post-hearing briefs filed by Respondent, the General Counsel, and Local 32B, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT AND STATUS OF THE UNIONS

Respondent is a New York corporation with its principal office and place of business located in Garden City,

[1] This adjustment followed Weise's testimony on direct and cross-examination. To the extent that testimony bears on the outstanding allegations remaining to be disposed of by this Decision, it had been weighed and considered herein.

New York, where it is engaged in the management of apartment houses. The apartment houses involved in this proceeding which Respondent manages are all located in the Borough of Brooklyn, New York. During the past year, Respondent had gross revenues in excess of $500,000 derived from rental of the apartments it manages and purchased and caused to be transported and delivered to its place of business products, goods, and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to it, and received from, other enterprises located in the State of New York, each of which other enterprises had received the said goods and materials in interstate commerce directly from States of the United States other than the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that both Local 32B and Local 2 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manages 10 apartment houses in Brooklyn. For many years Respondent has been party to a collective-bargaining relationship with Local 32B which has represented as exclusive bargaining agent the building employees Respondent employs at these buildings. These employees include porters, handymen, and superintendents.[2] The last agreement was made effective September 1, 1978, and terminated April 20, 1979,[3] by agreement of the parties. It covered the employees of all 10 buildings under one agreement in one bargaining unit with a rider covering wages for the employees by job category at each building. In accordance with the past agreements, this one included provisions authorizing Respondent to continue in effect its own welfare and medical coverage and pension fund in recognition of their superiority of the Union's own welfare and pension funds.

B. *Negotiations Between Local 32B and Respondent Towards a Successor Agreement*

By letter dated May 31, 1979, Local 32B Contract Director Thomas Latimer wrote George Mallouk, president of Respondent, requesting that he contact LeRoy Walker, recording secretary of District 9 of Local 32B in Brooklyn, of to commence negotiations for a successor agreement.[4]

The first meeting between Walker and Mallouk took place in August 1979. In making demands for a successor agreement, Walker and Local 32B were guided by the demands the Union had made in negotiations then taking place between Local 32B and the Realty Advisory Board of New York (herein called Advisory Board) covering employees employed in apartment buildings represented by the Advisory Board in a large multiemployer bargaining unit located primarily in Manhattan. Also, Local 32B had adopted a policy seeking to achieve standardization between wage rates and termination dates for all buildings in Brooklyn, Queens, and Staten Island with which the Union had a collective-bargaining relationship and those achieved in the negotiations with the Realty Advisory Board which were generally embodied in a standard, independent agreement which the Union sought to have executed by Manhattan building owners and managers not parties to or represented by the Advisory Board. The consequence of this policy was an effort by Local 32B to achieve a standard wage rate and coterminous contract starting and termination dates for all buildings under Local 32B's jurisdiction where it represented building employers in Manhattan, Queens, Brooklyn, and Staten Island.[5] These dates were April 21, 1979, to April 20, 1982.

Following these guidelines, Walker first proposed a $50-a-week across-the-board increase at the commencement date and each anniversary year thereafter for each category of workers. This was the initial demand the Union had made in the Advisory Board negotiations. This demand thus included like $50 increases on April 21, 1979, 1980, and 1981, with the agreement expiring on April 20, 1982. Mallouk rejected this demand as excessive and also objected to the timing of the increases and the contract's effective date. Mallouk wanted any increases effective in September as they had been in the past. During the meeting, Walker explained the Local 32B policy of standardization previously described. As a consequence of the complications Mallouk saw developing in the bargaining process, he retained counsel, Leon A. Katz, Esq., for further negotiations with Local 32B.

The next discussioms took place by telephone during September 1979. Walker informed Mallouk the Union must have the April 21, 1979, commencement date, April 20, 1982, termination date, and increases effective at the commencement and at each anniversary. Walker this time proposed increases of $18, $18, and $17 per week for superintendents, $24, $25, and $23 for handymen and $22, $23, and $23 for porters. Walker explained that these figures could be adjusted either up or down depending on the existing wage structure in each of the 10 buildings managed by Respondent under the prior agree-

[2] Respondent has not disputed the appropriateness of this unit for purposes of collective bargaining under the Act, and, indeed, in view of the lengthy bargaining history would be hard pressed so.

[3] The agreement is of an unusually short duration, less than 8 months in all. The termination date relates to Local 32B's effort to achieve uniformity in terms of both wage rates and contract duration between employers in Brooklyn, Queens, and Staten Island and those in Manhattan, a subject which will be described at greater length, *infra*.

[4] The letter also referred to the fact that it enclosed Respondent's copy of the agreement which had recently expired on April 20, 1979, and which Respondent had executed in August 1978. The inordinate delay of the Union in forwarding the employer a fully executed copy was explained by Mallouk as an apparent failure of the then Local 32B President John Sweeney to sign the copy which had been earlier forwarded to Respondent.

[5] The policy thus overrode difference in both rentals and operating costs between Manhattan and the other three boroughs of New York City involved. Certain exceptions to implementation of this policy existed based on such factors as the absence of any prior bargaining history with the building employer because of recent organization of the building's work force and willingness of the Union to enter a contract of less than the Union's standard 3-year term where the annual step increases exceeded the amounts included in the standard independent agreement. Even in these cases, the Union sought to achieve the common expiration date embodied in the Advisory Board and standard independent agreements.

ment so long as the wage structure comported with that contained in the standard independent (or master) agreement which had recently been concluded.[6] Mallouk countered with a proposal of three increases on September 1, 1979, 1980, and 1981 of $15, $16, and $15 per week for all workers. Mallouk added that if he had to pay an increase retroactive to April 1979, it would be considerably less, totaling 15, payable as follows: $7.50 per week to September 1, 1979, and another $7.50 per week to September 1, 1980. Walker rejected this counterproposal as unacceptable in light of the Union's standardization policy.

At a subsequent face-to-face meeting attended by Katz, Mallouk, and Walker held in December 1979, the parties continued to hold to their respective positions regarding wage increases. Mallouk referred to various economic factors, taxes and heating costs among them, and said he could not afford the increases the Union sought. Walker said the Union had to have the April 21, 1979, effective date and April 20, 1989, termination date in keeping with the Union's standardization policy. Mallouk said he still wanted the September 1, 1979, starting date but was willing to make his second increase effective April 21, 1980, and his third on April 20, 1981, as sought by the Union.

A second meeting was held toward the end of December 1979 and by the same participants. At this time, Mallouk increased Respondent's wage offer as follows: Effective September 1, 1979, superintendents to receive an increase of $18 per week, handymen $17, and porters $15; effective April 20, 1980, superintendents to receive $18, handymen $18, and porters $16; and effective April 20, 1981, superintendents to receive $20, handymen $18, and porters $18.[7] According to Mallouk's testimony, which was not disputed and which I credit, Walker did not accept this offer. He said he could not move from his outstanding prior position on wages. Walker clearly gave the impression that he was not a free agent but would have to get approval from higher authority in the Union for agreement on Mallouk's proposal.[8]

At this second December meeting, Katz raised the matter of employer party signatory to any successor agreement, pointing out that since building management could change, the Union's risk of holding the employer responsible would be lessened by obtaining the name of the corportaion holding title to the building on the agreement even though Respondent's president, Mallouk, would continue to sign for each of the owners, as agent. As each of the 10 Respondent managed buildings had different ownership, this would require preparation of ten separate agreements.[9] Walker apparently did not object to this change, and, in a subsequent telephone conversation initiated by Katz, confirmed that the multiple agreements would be prepared and forwarded to Respondent. Under date of January 21, 1980, Local 32B Contract Director Latimer mailed 10 duplicate sets of agreements to Respondent, each containing a separate rider (replacing the prior single agreement and rider) covering the wage increases and rates for each catagory of employee employed at the individual buildings. Each rider contained the increases, as adjusted, in conformity with Local 32B's outstanding wage increase proposal made by Walker at the September 1979 meeting. Respondent stipulated that attorney Katz received the 10 contracts on February 6, 1980. These agreements were never executed by Respondent.

Toward the end of January 1980 another meeting was held at Respondent's request at Katz' office. The parties continued to maintain their prior wage proposal positions, Local 32B's proposal having been made in September and Respondent's having been last modified at the second December meeting. Building economics were again discussed, Mallouk voicing the view that management could not afford the Union's proposed increases. Walker continued to insist on compliance with Local 32B's policy of standardization so that Respondent's employees received the salaries specified in the standard independent agreement by the set anniversary dates and so that the agreement became effective and terminated likewise in a uniform manner.

Although further meetings were held, one or two in February, at one of which the 10 individual contracts which had been delivered were discussed, one in March, one in April, and one in June 1980, these were generally of short duration, were held at Respondent's request and were not all attended by Mallouk, and resulted in no change in the parties' positions regarding the amount of salary increases, their effective dates, and the effective date of any agreement. At none of these meetings did Walker indicate that the Union was willing to make any deviation from its standardization policy, although Walker did participate in negotiation with other Brooklyn employers during the same or a slightly later period of time with whom Local 32B entered agreements which did deviate from the standard terms under exceptions previously noted. At none of these meetings did Respondent disclose or discuss any of its alleged acts and conduct considered in the next section of this Decision, including unilaterally determined and issued salary increases and meetings with its employees to discuss the Union's unfair demands and to induce their change of representative from Local 32B to Local 2. No meetings have been held since June. The other events impinging on the parties' relationship which interceded remain to be discussed.

[6] Mallouk recalled these figures slightly differently. I will credit Walker's recollection of his offer modifying the Union's initial $50 demand. Walker explained that there was no standard increases for superintendents but that the figures he proposed for handymen and porters would bring their rates up to the level of those contained for their categories in the citywide independent contract by the end of the agreement on April 20, 1982.

[7] Walker did not testify to this employer offer but on cross-examination did not deny that Mallouk made it, but only stated he did not recall these figures. I credit Mallouk that he made this wage offer at the second December 1979 meeting. The record does not contain the final wage settlement included in the Advisory Board agreement. Mallouk at one point insisted that this counteroffer was equal to or exceeded the standard agreement.

[8] I find that Walker had limited authority to negotiate with Respondent but that Respondent was aware of this limitation early in their meeting and nonetheless continued to deal without objection to this restriction.

[9] Katz' proposal did not affect Respondent's apparent agreement, or, at any rate, its acquiescence in the continued appropriateness of the overall unit comprising all covered employers employed at all 10 of Respondent-managed Brooklyn buildings.

C. *Alleged Acts of Interference with Employee Rights To Continue Their Support of Local 32B, Unilateral Changes in Terms of Employment, and Alleged Assistance to Local 2*

Edwin Weise, the then handyman employed by Respondent at 2301 Kings Highway, Brooklyn, testified that in January 1980, on one of Mallouk's periodic visits to the building, he, the porter, and a superintendent from another building who was present, were called into a meeting in the apartment of Walter Demmet, the building superintendent, to listen to Mallouk address them. Mallouk informed them that he was concerned about the size of the wage increase the Union was demanding, that he was going to encourage them to get a different union, because he was not going to pay the increase demanded. The Union is imposing this increase on him, and the only way to get rid of it is to change unions. At the same meeting, Weise testified that Superintendent Demmet told Mallouk that if the increase was to come, "why don't you fire the handyman."[10]

Further, according to Weise, a couple of days later, Louis Arnemann, a business agent for Local 32B, visited his building. Arnemann, who also testified, stated his purpose was to find out if Respondent's employees were in favor of a strike, if necessary, and to obtain the names of the employees. Weise testified, and Arnemann corroborated, that Weise signed a sheet in favor of Local 32B's position in the negotiations and to strike, if called for, in front of Demmet. According to Arnemann, Vazquez, the porter, also signed. Weise swore that before he signed, Demmet told him that if he signed the papers Arnemann had brought he could be fired. Arnemann, who was not called to the stand by the General Counsel, but who testified during Respondent's presentation, recalled that Weise said at the time that he was in favor of the Union because he could use the extra money. Arnemann could not recall any statement by Demmet to Weise that if he signed in favor of a strike he would or could be fired.

Weise also testified about a meeting he attended around March 1980, on a workday, in the apartment of Henry Deteskey, superintendent for Respondent of the building located at 1320 51st Street, Brooklyn.[11] According to Weise, he and Vazquez were driven to the meeting, sometime in midmorning, by Demmet who had told them that Mallouk wanted that meeting, so they had to be there. When he arrived, at or around 10:30 a.m., Weise entered the living room and saw the men who worked in Respondent's other buildings, over 20 in all, including superintendents, handymen, and porters. Coffeepots, cookies and danish, sugar, and milk were set out on tables. Weise also saw both Mallouk and attorney Katz in the same room. When everybody settled down, Katz spoke to the assembled employees. He said, "I'm going to speak. We are in a free, democratic country, and we are here purposely to let you know that we are going to institute a different union. This is the union we want, Local 2." Weise testified he spoke up to say "it's very difficult to change from a union without going through a lot of processes." In reply, Katz said, "we're in a free democratic country, this is the United States of America, and we can change from one union to another." When further pressed by Katz, Respondent's counsel, on cross-examination, as to whether he, Katz, had advised the people present to get rid of Local 32B, Weise responded that Katz said he had won a battle against 32B in a New Kirk Avenue building, with the assistance of Local 2, and that, in Weise's view, this was said to encourage the men to move from 32B and get into Local 2.

According to Weise, Mallouk also spoke, he said "Gentlemen, get your names. I can't do this, because I am the employer, but you all, as employees, can do it." Mallouk added "well, you have to get up on change, and fix up, and put your names on list of paper" and things like that. Weise added on cross-examination that Mallouk had encouraged the men, collectively, that he would get an attorney, because it is expensive, whatever hundreds of dollars it would take, and he would finance it so long as all of us would put our names, because he personally could not coerce or force us into it, we would have to do it voluntarily.[12]

Weise continued that in a little while Mallouk left, and Katz left a little later, but before he did, Local 2 President Gerstein and Secretary Treasurer Smolky arrived and came into the room where the employees were gathered. Katz introduced Gerstein as the man from Local 2, then left and Gerstein now spoke. Gerstein described the advantages of joining his union, that the members are not compelled to strike, that initiation fee is $25 and dues is $8 per month, that his union is superior to Local 32B. Some employees present spoke about the health and pension benefits provided by Respondent and not under the Local 32B plans. Gerstein said Local 2 provided these benefits as well. At some point, a building superintendent named Julio Gonzalez, suggested a vote on joining Local 2 and hands were raised in a straw poll indicating heavy

[10] The amended consolidated complaint alleges Demmet and Henry Deteskey, another building superintendent, to be supervisors within the meaning of Sec. 2(11) of the Act and that Demmet, by this conduct, and Deteskey, by other conduct to be discussed, *infra*, committed violations of the Act as agents of Respondent. While Respondent must be deemed to have admitted Demmet's supervisory status by a conscious failure to deny that status in its written answer—a decision which I refused Respondent leave to change during the hearing—Respondent did place in issue Deteskey's status by denying his supervisory position in a later answer to the amendment concerning Deteskey's role in convening a meeting of empoyees Respondent is alleged to have provided assistance to Local 2. The supervisory status of Respondents' building superintendents will thus be examined and determined on its merits at a later point in this Decision. Their alleged role as agents will also be reviewed.

[11] Weise's testimony was somewhat confusing in that he initially placed the location of the meeting at a Respondent-managed building on "Dunhill" Road (one of the 10 buildings is located at 70 Dahill Road) and described the superintendent as a man named "Henry Smoloky" (confusing Deteskey's name with that of one of the two Local 2 official's who appeared in Deteskey's apartment that day, Secretary Treasurer Harry Smolky. All other witnesses who testified about this meeting, including Gerstein who had checked his diary entries for that date, placed the meeting in February, rather than March. I credit Gerstein's recollection as refreshed by his notes and will fix the meeting as held on February 14, 1980.

[12] It is not entirely clear from Weise's testimony whether Mallouk made this last remark at the January meeting with the small group of employees at Weise's building or at the March meeting with all employees.

support among the employees to change from Local 32B to Local 2.[13]

Other witnesses added details regarding the meeting and its genesis, differing in some material respects from Weise's account.

Henry Deteskey, the superintendent in whose apartment the meeting was held, is a member and the shop steward for Local 32B. He was not involved in the negotiations being undertaken by Local 32B, and believed, in error, that the last contract expired September 1, rather than April 20, 1979. However, from time to time after September 1, 1979, Walker kept him informed on the status of negotiations. Toward the end of the year, Walker told him that Mallouk would not agree to the Union's contract proposal and that time was running out. In addition, Mallouk was advising him and other employees of the revised counterproposal he had made at the end of December 1979, and that because of the exorbitant union demands, which had now gone up, he could not settle with the Union, they wanted it their way.

By the beginning of 1980, the employees, including Deteskey, were aware of the continued difference in the parties' positions and of the Union's (32B's) interest in obtaining employee sentiment in favor of a strike, particularly on the occasion of Arnemann's January visit to the various buildings. According to Deteskey, the employees got together in a group a few times in this period to discuss their dilemma. They did not want to strike, they believed they were being paid a fair salary and had received good apartments in their buildings at decent rates. They figured to go and look for a different union. Deteskey learned from people he knew that Local 2 was a decent union.

Also, at the beginning of February 1980, each of the employees received the following message, dated January 31, 1980, from Respondent President Mallouk:

> We have not had any news of progress in the negotiations about the contract with Local 32B.
>
> We committed ourselves to paying increases to you effective September 1, 1979. Since there has been so much delay we are going ahead with the payment retroactively of the increase we proposed, as follows:
>
> | | |
> |---|---|
> | Superintendents | $18.00 |
> | Handymen | 17.00 |
> | Porters | 15.00 |
>
> You are receiving two checks; one will cover the increase for the period September 1—Decmber 31, 1979; the other will cover the increase from January 1, 1980 to date.[14]
>
> Best wishes

Neither this unilateral salary increase nor the later ones described were negotiated to agreement with Local 32B. In fact, Local 32B was not informed of these increases at any time by Respondent.

In the same month, February 1980, Local 32B Business Agent Arnemann, accompanied by other agents, returned to Respondent's buildings, this time to more formally record employee views on striking their employer. Sheets for each of the 10 buildings had been prepared, meetings were held, and the employees voted for or against striking in the presence of their fellow coworkers at each building.[15] According to Arnemann, there were yes votes and there were no votes. Some did not feel free to speak because the superintendent was present, some of them were in favor of the union because they felt the cost of living had gone up considerably and they could use more money. The strike vote was split roughly half and half, with more superintendents against striking and the other building employees more in favor of striking.

At this point, Deteskey telephoned Respondent, spoke with vice president Helen Wikman, said the men were having a meeting and they wanted someone to explore their rights, obtained the telephone number of Katz, who he then knew to be Respondent's lawyer, and made telephone contact with Katz. He asked Katz to come down and advise the Mallouk employees of their rights, if they can go anywhere, to another union, and to express his feelings on where the contract was in dealing with Local 32B. He also called Gerstein of Local 2 and told him that the employees had problems, that they could not get a contract, that Local 32B, their incumbent union, wanted them to strike and the men wanted a different union and invited him to come down to meet the men the same day. Katz was invited for 11 a.m. and Gerstein for 1 p.m. Katz was informed, when invited, that Gerstein from Local 2 had also been invited for the same meeting. At the meeting Deteskey told Katz "we're calling Local 2 in." Katz addressed the men and told them it looked like nothing could be done—it was a dead end, apparently referring to the negotiations. Katz said Local 32B would not negotiate with Mallouk—it was just one way, and that was it. We had to accept the proposal of Local 32B. According to Deteskey, this mirrored what Mallouk had been telling the superintendents at the regular monthly meetings he held with them, that the Union was stonewalling, that you have to accept what the Union wants, that there are no negotiations, that he could not bring them down to a reasonable level.[16]

Accoring to Deteskey, Katz was present at the meeting for about an hour and also took questions from the audience. Deteskey also referred to some of the employees present being scared because of vandalism and property damage occurring at a building being struck, appar-

[13] Weise vacillated on his participation in this poll, first testifying he voted, then affirming that he remained silent, and did not raise his hand. His affidavit is consistent with his later testimony and I so find.

[14] Subsequently, by notice dated May 2, 1980, Respondent advised its employees it was also increasing their salary, effective as of April 21, 1980: for superintendents—$18, handymen—$18, and porters—$16. This increase was accompanied by a note which concluded "we are pleased to be giving you this increase with our best wishes." A third increase was granted $18, all per week. There is no question but that these series of salary increases conformed to Respondent's last wage offer made at the second December 1979 meeting.

[15] Although an attempt was made by Local 32B to locate the documents, it was unsuccessful.

[16] It was at one of these monthly superintendent meetings prior to the February meeting attended by Katz and Gerstein that Deteskey and other superintendents told Mallouk that because of the stalemate in negotiations they would try and see if they cold go to another local.

ently by Local 32B, in Coney Island. Deteskey asked what the men could do about getting another union. Katz responded that they had to go before the proper authority. If they, referring to Local 32B, would drop us, then we would go into another union. When pressed further as to Katz' description of the proper authority, Deteskey continued, "we, he said, you know, if somebody doesn't want to negotiate with you, it's America, you can go to another union; you have the freedom of movement."[17]

According to Deteskey, on the conclusion of his address, Katz left the apartment before Gerstein and Smolky appeared a few minutes later. In this, Deteskey was corroborated by Superintendents Walter Demmet and Tolly Pringle. Gerstein contradicted them and corroborated Weise. However, Deteskey also noted that he looked out the window as Katz left and saw Gerstein on the street wave and exchange a few words with Katz as Gerstein was on his way into the building.

None of the three superintendent witnesses, Deteskey, Demmet, and Pringle, placed Mallouk at the February 14 meeting. Both Mallouk and Gerstein also denied his presence. However, as Weise had placed Mallouk at the meeting only for a short while and as having left before Katz, Gerstein's recollection is not contradictory to Weise's.

Gerstein was called by Respondent and also testified in narrative form on behalf of Local 2. Gerstein confirmed his invitation from Deteskey to address the employees. He had been asked if Local 2 was interested in organizing a number of jobs. He was not aware that anyone associated with Respondent's management, much less its attorney, would also be present. When he walked into the apartment with Smolky at or about 1 p.m. "lo and behold, there was Mr. Katz. And my first words were, what are you doing here." At this point, both were standing in the living room surrounded by all of the employees. Katz responded that he was invited there by the men. When Gerstein asked what his position was here, Katz said, "I'm an attorney and I have been an attorney for Mr. Mallouk and I was invited to speak to the men about something." After a short discussion, unrelated to the subject matter of the meeting, Katz left and then for the first time Gerstein proceeded to talk with the employees.

Gerstein first introduced himself and Smolky and then asked the employees to explain what they could do for them. Deteskey and Demmet explained their situation, that they were former members of Local 32B, that Local 32B's contract had expired, that their relationship with the Employer was excellent and they did not want to hurt their employer by striking as Local 32B was insisting. Gerstein then said Local 2 did not want to be used against another labor organization. If they, he and Smolky, could help them, they would. At this point, by nods and vocal assents, the bulk of the employees noted that they wanted help. The discussion then turned to Local 2's contract benefits and Gerstein learned of Respondent's superior health and pension plans. Gerstein was careful to note that no authorization cards for Local 2 were then executed and that he did not receive any indication at that time that the men had made a determination to become affiliated with Local 2. Gerstein left some designation cards and business cards, asked the men present to think about it, and, if they really wanted Local 2 to represent them, they ought to call him and he would get all the necessary documents and file a petition with the proper agency, but that Local 2 did not want to be used.

Katz did not testify.

Mallouk testified about his involvement in the negotiation process and in communicating his views of that process to his work force. Corroborating Weise, Mallouk acknowledged meeting with the 2301 Kings Highway building employees in January 1980 while on a routine visit to the building. He said he seized on the opportunity to discuss the state of negotiations with the men. He asked Superintendent Demmett to invite Weise, the handyman, and Vazquez, the porter. Superintendent Pringle was there as well. He said, "Let's sit down and talk. I know you are concerned." His talk dealt with the fact that their wage scale was very satisfactory, which the men acknowledged, that they had made certain offers to the Union and he was working with an unchanging attitude from the Union. Mallouk went on—"As part of our position—I remember talking about the fact that we had an abundance of personnel in our buildings." Among other examples Mallouk cited to the small group of employees was that their own building, 2301 Kings Highway, had 94 apartments, a superintendent, a handyman, and a porter, which is beyond the usual complement for a building that size. He cited other buildings as well. Although Mallouk denied threatening Weise with discharge because of his Local 32B's activities at this meeting (it was Demmet, the superintendent, who uttered the alleged threat), he did not respond to Weise's specific claim that he encouraged his employees to get a different union under the circumstances of Local 32B's unreasonable wage demand which he was not going to meet. Mallouk confirmed the impression presented by the superintendents who testified that he was truly concerned with their having union representation and protection, particularly after he personally ceased performing the building management functions. Mallouk also confirmed, and this was implicit in the foregoing, that as chief employer representative his concern was quite paternal regarding the staff. Certainly, the past relationship with Local 32B, of longstanding, and personally with the staff, was apparently generally marked by cordiality and the absence of any real dispute. Yet, the impression was also created that Mallouk could be tough when he believed the economic circumstances warranted in fashioning a firm employer bargaining stance and seeking—through manipulation of his close relationship with the staff, particularly the superintendents, as well as the other categories of employees, several of whom had

[17] Another superintendent, Tolly Pringle, also called by Respondent, added that Katz informed them at this meeting that they, the employees, had a right to take a vote and see who wanted to go with the Union and who wanted to go with the Employer. With respect to the procedures to get another union, Pringle's recollection was that Katz told them there was certain procedures the men would have to follow, but he did not say what those procedures were.

more than 14 years' service with him and stayed generally to retirement, to achieve his bargaining objectives, if not with Local 32B then with another union. Mallouk's subtle, yet clear implication expressed in his January remarks was that continued adherence to Local 32B's demands for standardization could only lead to a strike and, if compelled through this economic sanction, to agree, then to layoffs and loss of enployment for a number of the more than 20 unit employees. Given this view of Mallouk's character and personality and as exemplified on the witness stand, I credit Weise's testimony attributing the remarks made at this January meeting to both Demmet and Mallouk. While Weise was somewhat confused on dates and names in his recital of the events to which he testified, I conclude that as to the substance of the statements attributed by him to Mallouk and Demmet at the January meeting, as well as to Demmet later in January on the occasion of Arnemann's visit to the building,[18] and the statements by Mallouk, Katz, and Gerstein at the February 14, 1980, meeting, they were accurately reported by Weise and I shall credit him. His testimony was consistent and he intelligently responded to Respondents' probing cross-examination. With respect to Mallouk's denial that he attended the February 14 meeting, backed up by the superintendents who testified, I am convinced that Mallouk attended, introduced Katz, spoke to the subject of the petition process by which the men could implement their desire to change unions, encouraged them to do so, and offered the services of his company's own attorney to achieve this end.

I was not impressed by Mallouk's denial. Mallouk also was somewhat inconsistent and fenced with counsel during his cross-examination, factors which also help me to conclude that his testimony was unreliable in crucial points, such as his comments at the January 1980 building meeting and his attendance and comments at the February 14 meeting. In his affidavit taken by a Board agent on July 8, 1980, 6 months later, Mallouk stated that he did not recall the meeting with Weise and others in Demmet's apartment in January 1980. On the witness stand, Mallouk testified to his version of his remarks at the meeting, recalling this meeting as one of a number of informal meetings in which he kept his employees apprised of the status of the "nonnegotiations" (his own words) with Local 32B. It was Weise's testimony, Mallouk said, which refreshed his recollection, an explanation for recalling his remarks almost a year after the event which I find difficult to believe. Furthermore, Mallouk denied that he told the employees at the January meeting that he could not afford the salary proposed by the Union, but agreed he told them the demands were excessive, although his affidavit contains precisely his sworn statement that he may have said he could not afford the salaries imposed by the Union.[19] Nor was I impressed by the superintendents' recollections, particularly since none of them were able to recall Gerstein and Katz together in Deteskey's living room in the face of Gerstein's own testimony. Gerstein, who had the most to lose by revealing this happenstance, is credited that he, indeed, confronted Katz in the living room in the presence of the employees. With respect to Katz' remarks, I am persuaded, in part, as to the accuracy of Weise's testimony regarding them, by Deteskey's candor when pressed to amplify the nature of Katz' advice offered at the meeting. This corroborated Weise's own recollection that Katz sought to encourage the employees to exercise their "democratic right" to change bargaining agents.

Local 32B was not informed by any of the employees about his February 14 meeting with the Employer and Local 2. By March 1980, Local 32B was seeking final membership authorization to take action on the Respondent's refusal to accede to its contract demands for standardization. On March 14, 1980,[20] Walker met with the 21 unit employees at Shop Steward Deteskey's building, 1320 51st Street, Brooklyn. After bringing the employees up to date on the most recent meetings with Mallouk and the fact that Mallouk still refused to agree to the Local 32B proposals regarding salary increases and contract effective date, Walker asked the employees to provide him with the direction that should be taken. The employees said they wanted a secret-ballot vote on striking, a container was produced, ballots were cast, and the results showed 20 for no strike and 1 in favor of striking. At this point accounts vary. According to Demmet's testimony, which I credit, before the strike vote, Walker said, "I know Mr. Mallouk's a good man. I know you like him and he's good to you, he's a gentleman. But in case he's no longer here, what are you men going to do." Demment then testified that after the vote Walker said, "well, if that's the way it is, I'll just have to go back with this the way it is, that's all." According to Deteskey, at one point, which was probably before this vote but after Arnemann and other agents canvassed employee sentiment on striking in January or February, during a telephone call, after Deteskey said "let's do something already about the differences" with Respondent, Walker responded he had to go upstairs to the higher-ups and notify them and "see if anything can be done, if they agree; maybe they didn't want us, they would drop us." Pringle testified that after the 21 to 1 vote against a strike, Walker told the employees that if they did not accept what the Union offered them, they (the Union) would just take a walk.

Weise testified that after the vote Walker said "Gentlemen, I'm going to take this vote to the executive board of 32B. I will come back to you some other time with

[18] Arnemann's lack of recollection notwithstanding.

[19] Mallouk's refusal to concede this point at the hearing becomes significant with respect to Mallouk's acknowledgement that he also told the employees he had an abundance of personnel in his buildings. Without a claim that he could not economically pay the Union's demands, Respondent is hardly in a position to allege that Mallouk's comments constitute a prediction of future employer conduct compelled to accede to the Union's demands rather than a threat of economic retribution for continuing to support Local 32B's bargaining demands.

[20] The three superintendents placed this meeting where a secret ballot vote for no strike was finally taken at various points in time, both before and after the February 14 meeting with the employer and Local 2, in a number of instances without having any clear recollection of it. Walker's contemporaneous notes of the meeting fix the date as March 14, although he testified it was held on March 4, apparently misreading the date on his memorandum. I find March 14, 1980, to be the accurate date of this meeting.

the reply," and that thereafter Walker did not return with any reply.[21]

Walker testified on cross-examination that at the strike vote he explained to the men, "these are the conditions we're trying to get for you and we may have a problem and if it's not accepted then I'll have to talk to you about it when I get back." He did not recall saying that if they do not accept it upstairs and the men would not strike he would have to walk away from the building and the men were on their own. Later, on rebuttal, Walker denied he ever told the men he was walking out. In the calls to Deteskey he told Deteskey the Union was still trying to see if some adjustments could be made and after the strike vote he said that since they refused to strike, the Union would have to use other methods in order to bring the Employer to the bargaining table. That among those methods ultimately utilized by the Union Walker said was the filing of the instant charge in Case 2-CA-8327 alleging violations of Section 8(a)(1)(2) and (5) of the Act on September 22, 1980.[22] Walker also testified that the Union also started another procedure—to check Respondent's books and to check its dues-payment records after Respondent ceased checking off or remitting union dues. Mallouk confirmed that in 1981, the Union sought to audit Respondent's employee pension and medical plans and to verify its checkoff system. By letter dated February 25, 1981, Local 32B notified Respondent that it had failed to remit checkoff statement and remittance of dues for January 1981, as obligated by contract. Other union demands of a similar nature were received by Mallouk. Subsequently, an arbitration was commenced by Local 32B seeking the dues withheld for January 1981, Respondent defaulted and failed to appear before the arbitrator, but unsuccessfully sought a state court stay of the proceeding, on the ground of no contract, an arbitration award issued in May 1981 awarding Local 32B dues for the period October to December 1980, but Respondent has not complied and Local 32B had not sought its confirmation. Local 32B also distributed a leaflet to its members employed by Respondent in August 1980 and again in March 1981, advising of the risks of their continuing on the job without contract benefits and protections and informing of the steps it was taking to guarantee them job security and a decent wage, including requesting copies of the Employer's pension and health plans and an audit to verify compliance with the contract terms regarding overtime and holiday pay and the like. Tenants of Respondent-managed properties were also notified to contact Mallouk to sign the standard contract to avoid a strike. Mallouk also denied that Walker ever advised him that he was walking away from his buildings. On this subject, I credit Weise, Walker, and Mallouk, as against Pringle and Deteskey. Furthermore, the record evidence contradicts any claim that Local 32B ever abandoned its representation rights and obligations toward Respondent's employees, as suggested by Respondent during the hearing.

In March, Gerstein started sending Local 2 agents to Respondent's buildings to organize the employees. It was not until mid-June 1980 that any of Respondent's employees appeared to have executed Local 2 authorization cards. Over a series of days in June, the bulk of the unit employees signed Local 2 cards, a few signing in July. By letter dated June 25, 1980, Gerstein, for Local 2, notified Respondent that it represented the building service employees in 9 of its buildings and demanded bargaining, later adding a claim for the 10th building when it filed 10 separate petitions for certification with the Board on August 29, 1980. Those petitions have been administratively dismissed by the Regional Director, without appeal, upon issuance of the instant consolidated complaint.

Respondent claims it did not reply to the demand, but rather, it filed its own petitions with the New York State Labor Relations Board in early July 1980, initially failing to include Local 2 as a competing union claiming representational status, and later amending the petitions to include Local 2's claim.[23] Local 32B opposed state assertion of jurisdiction, and petitioned the Board for an advisory opinion under Section 102.98 *et seq.* of the Board's Rules. On October 15, 1980, the Board issued its Advisory Opinion in Case AO-226. After referring to the charges and complaint already issued, later consolidated as earlier described, and the fact that Respondent had denied it was engaged in commerce in its initial answer, the Board deferred determination of jurisdiction to the pending statutory unfair labor practice proceeding.

By letter dated November 9, 1981, Attorney Katz, responding to a request from the Regional Office of the Board for the correct status of the consolidated matters advised, in relevant part, that: "Subsequent to negotiations with Local 32B being broken off, the employees designated Local 2 as their choice for a collective bargaining agent. The employer met representatives of Local 2 and negotiated an agreement which was submitted to the employees and was about to be signed. At that point, a conference was conducted at the New York State Labor Relations Board, as a result of which a hearing was set." The letter went on to recite the subsequent history of the filing of charges and petitions with the Board, and then noted that "The contract which had been submitted by Local 2 was not executed, since the controversy existed, and the employer was unable to recognize anyone to bargain on behalf of the employees." The writer went on to argue that Local 32B had engaged in practices contrary to law and that the Employer's recognition of that union would violate employee rights.

Both Mallouk and Gerstein denied engaging in any negotiations or meetings after Local 2's bargaining demand

[21] Walker acknowledged that after the no-strike vote he did not receive any authorization to change the Union's bargaining position with Respondent.

[22] Weise's charges in Case 29-CA-8042-2, alleging violations of Sec. 8(a)(1), (2), and (3) of the Act, antidate Local 32B's and obviate whatever 10(b) problem that might have arisen with respect to the allegation by virtue of Local 32B's filing have occurred more than 6 months after certain events earlier described in this Decision, if the allegations in Weise's charge had been disposed of in the adjustment of Weise's 8(a)(3) allegation. Those 8(a)(2) allegations in Weise's charges and in the complaint were not withdrawn or dismissed on the adjustment of Weise's discharge case.

[23] These state proceedings came to a halt after the charges and petitions were filed with Region 29.

and Mallouk denied receiving any contract from Gerstein. Katz, as earlier noted, did not testify to explain the comments quoted in his letter. Mallouk also testified that, although he learned about Katz' February 14 meeting with the employees shortly after it was held, from Katz himself,[24] he did not learn from Katz about any negotiations that Katz may have undertaken on behalf of Respondent with Local 2. When he received a copy of Katz' letter to the Board, he immediately called Katz' office to object to the incorrect assertions earlier quoted. Mallouk also noted that while he had not authorized Katz to conduct such negotiations he did not know if any had been held.

I turn now to the facts regarding the issue of alleged supervisory status of Respondent's building superintendents. They are in charge of routine maintenance of the various service utility systems in the buildings, heating, water, electrical, and garbage disposal, and the cleanliness and appearance of the buildings. They make and oversee minor repairs, receive requests for repairs from tenants and undertake them, look after building security, receive deliveries of merchandise and install merchandise in apartments, and collect rents. In some cases, generally the larger buildings with more apartments, they are assisted by handymen and/or porters, some part time. As noted earlier, a number of the superintendents and assistants are employees of longstanding and are familiar with the routine maintenance functions and duties required.

The superintendents can order minor equipment and supplies on their own but major purchases are referred to Respondent's corporate office. They do not exercise independent judgment regarding building supplies or tenant leases. Mallouk holds monthly meetings with the superintendents to review common problems, discuss new products, or procedures. Mallouk himself also visits each building once every 10 days, spending at least an hour on the average, obtaining information on building conditions and reports on any problems which may have arisen, including relations with the part- or full-time assistants. Mallouk visits up to five buildings in a day. In addition, a service manager of Respondent, who operates out of the Garden City headquarters, also visits the building on a regular basis, twice a week to each building, dealing with problems, including personnel ones, routine maintenance, and any other work problems which have been raised by the superintendents.

The superintendents assign repair jobs to handymen and oversee the general cleaning work and clearing the compactors performed by porters. The handymen and porters have set jobs which are defined by Mallouk and the service manager and since a substantial number of them have some years of service with Respondent they generally know their routine duties and perform them without close supervision.

In the one instance on which extensive relevant testimony was heard prior to the adjustment of the discharge case, the record shows that Weise, the handyman, was referred by Superintendent Demmet to Mallouk for interview and hire[25] and that, with respect to his discharge, Mallouk acted contrary to Demmet's recommendation to retain him and give him another chance after receiving reports of Weise's failings on the job.[26] In one other case, Mallouk credibly testified that in the case of the only other discharge in the recent past of an employee who split his work time between two buildings, the superintendents differed in their recommendations.

While superintendents in the past have interviewed and referred applicants other than Weise, Mallouk makes an independent evaluation and determination before hire. And although, according to Mallouk but disputed by Weise, Demmet could and did warn Weise about his alleged habitual lateness in coming on duty and unavailability during work hours, and Mallouk "well weighs" the personnel recommendations of the superintendents, the limited record evidence supports the conclusion that such recommendations are not uniformly or even generally followed by higher management in terminating the employment relationship.

Another employee, Superintendent Deteskey, the Local 32B shop steward, reported he is assisted by a part-time porter in his building, that he cannot discipline him but can recommend discipline but has not, does assign him work but the porter has been employed 9 years and is familiar with his duties, keeps the record of the porter's work hours, can approve paid time off up to an hour or so but for a longer period of time off must notify the corporate office for their consideration of the request.

Under the expired agreement, superintendent's salary generally exceed handymen by $16 to $18 weekly and porters by $11.

I conclude on the basis of the foregoing recital of facts that the superintendents are not statutory supervisors within the meaning of the Act, but are more in the nature of more experienced, senior employees who routinely supervise the maintenance of their buildings, but subject to regular and constant higher supervision, report and even recommend on personnel actions regarding the assistants under them, but do not exercise independent judgment on personnel matters and are not uniformly or even generally followed on their personnel recommendations when made or solicited.[27]

While having been found to lack supervisory authority, I must address the General Counsel's allegation that both Demmet and Deteskey are agents of Respondent whose statements and conduct bind Respondent under the principle of *respondent superior.*

The statements of the only nonsuperintendent employee to testify, Weise, and other testimony support the con-

[24] Mallouk never disclaimed Katz' authority to speak on behalf of Respondent at the February 14 meeting, although he continued to maintain that he was not present. Mallouk here also contradicted other testimony where he swore he learned of the February 14 meeting from Deteskey.

[25] The April 5, 1979 letter of hire notes, *inter alia,* "I have spoken to Mr. Demmet about your selection, and he is ready for you to start at your earliest convenience."

[26] Weise's May 1, 1980 discharge letter from Mallouk notes, *inter alia,* that "The superintendent agrees with us that your services have not been satisfactory." The discharge however was effectuated by Mallouk and overrode Demmet's recommendation. Demmet's alleged threat of discharge of Weise, made in January 1980, will be separately considered.

[27] See *The Washington Post Company,* 254 NLRB 168 (1981); *Peat Manufacturing Company,* 251 NLRB 1117 (1980); *Ohio State Legal Service Association,* 239 NLRB 594 (1978); *Westlake United Corporation,* 236 NLRB 1114 (1978).

clusion that the employees tended to regard the superintendents as closely identified with management, and that, accordingly, Respondent was speaking and acting when Demmet uttered the threat of discharge to Weise when he voiced support for Local 32B on the occasion of Arnemann's January 1980 visit to his building and when Deteskey arranged the February 14 meeting in his apartment.

Weise was instructed to come to the meeting that Mallouk "wanted held" and was driven there by his superintendent. Another superintendent, Deteskey, arranged and sponsored the appearance of his employer, his employer's attorney, and an official of another union. Weise testified he believed Demmet was his employer, "he gives me orders and I comply with them and I do everything he tells to do." Arnemann commented that handymen and porters appeared reticent to talk or speak freely about their Local 32B sentiments when in the presence of their superintendents. The assistants are also excluded from the monthly meetings the superintendents hold with management. I conclude that the superintendents have close ties to management, that the assistants perceive that the superintendents have these ties and could reasonably believe that the superintendents spoke and acted for management, particularly on the union-related matters to which these cases are addressed.[28] I therefore also conclude that Demmet acted as Respondent's agent in issuing the January threat to Weise and that Deteskey acted as Respondent's agent in arranging the meeting at which Respondent allegedly assisted Local 2.

Analysis

The facts found in this case readily support the conclusion that Respondent engaged in a pattern of illegal conduct designed to replace Local 32B with a new union, Local 2, thereby enabling Respondent to rid itself of the problems created by a set of bargaining demands with which Respondent did not wish to comply.

With employees such as Weise, who remained outspoken in support of Local 32B, Respondent's agent, Superintendent Demmet, made clear the Employer's displeasure in such conduct and made unlawful threats of discharge. With small groups of employees, including handymen and porters, who might be more inclined to support Local 32B's efforts to substantially improve their wage position and bring it in line with Local 32B's citywide independent agreement, to whom Mallouk coupled his claim of inability to pay and accusations of Local 32B's unreasonableness, with the assertion that his buildings had an abundance of personnel, Mallouk was making a veiled threat of economic reprisal if the employees supported Local 32B's contract demands, up to and including a strike to enforce those demands.[29]

All the time that meetings were ongoing with Local 32B, Mallouk was periodically and systematically making his displeasure with the course of negotiations known to his employees[30] and reinforcing his independence from the negotiating process and undermining the relationship by unilaterally and without union notice granting salary increases. Under recognized principles of law, an employer party to a bargaining relationship is not privileged to make unilateral changes in terms and conditions of employment in the absence of a bargaining impasse.[31] After the expiration of a collective-bargaining agreement, the employer is obliged to continue to bargain with the union over terms and conditions of employment.[32] At the time Respondent notified its work force and placed the initial salary increase into effect, its attorney had not yet received Local 32B's draft of the 10 agreements which Respondent itself had suggested as an aid to the Union in enforcement of contractual terms. Thus, bargaining was still underway and, even if no unfair labor practices had been committed by the Employer, no impasse had yet been reached, even on salary terms.

Of greater significance on this record in rebutting Respondent's claim of privilege in unilaterally implementing its last best salary offer is the fact that Respondent's pattern of conduct, commencing in January 1980, or even earlier, through direct dealing, threats, and criticisms of Local 32B, and suggestions that the employees select a new bargaining agent with whom Mallouk would be more comfortable, renders such a defense a nullity. Respondent's unilateral conduct thus took place in an atmosphere permeated by its unfair labor practices and falls for that reason alone. In the absence of objective consideration necessary to support a showing to rebut the Union's presumption of continued majority representative status, neither could Respondent legitimately claim that the Union no longer enjoyed such majority status.[33]

Respondent's belated filing of the petitions with the state agency and the reliance on Local 2's filing of representation petitions with the Board as ground to refrain from any further dealings with Local 32B, and the claim, articulated in its attorney's letter to the Region, that its employees had rejected Local 32B and selected Local 2, are further aspects of its refusal to bargain. Not only did Respondent unduly directly influence its employees' reaction to the bargaining process with Local 32B prior to February 14, 1980, but by its conduct at the February 14, 1980, meeting with its employees, it gave strong support and inducement to its employees and set in motion the

[28] See *B-P Custom Building Products, Inc.; and Thomas R. Peck Mfg.*, 251 NLRB 1337, 1338 (1980); *Samuel Liefer and Harry Ostricker Copartnership d/b/a River River Manor Health Related Facility*, 224 NLRB 227, 235 (1976). See also *International Association of Machinists, Tool and Die Makers Lodge No. 35 [Derrick Corporation] v. N.L.R.B.*, 311 U.S. 727 61 (1940).

[29] Mallouk's assertion was no prediction, which must be accompanied by supporting objective considerations that can substantiate such prediction, but rather was a veiled and implied threat, no less effective because it was implied, *Walter Jack and Dixie A. Macy d/b/a 7-Eleven Food Store*, 257 NLRB 108, 114–115, fn. 48 (1981); *Coca-Cola Bottling Co.*, 250 NLRB at 1345 (1980).

[30] While the complaint does not allege direct dealing and bypassing of the Union, I may take such conduct into account in evaluating the Employer's overall conduct on the refusal-to-bargain issue.

[31] *N.L.R.B. v. Benne Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962).

[32] *Digmor Equipment and Engineering Company, Inc.*, 261 NLRB 1175 (1982).

[33] See *Nu-Southern Dyeing & Finishing, Inc., and Henderson Combing Co.*, 179 NLRB 573, fn. 1 (1969), enfd. in part 441 F.2d 11 (4th Cir. 1971).

movement for Local 2, which up to that point had been less clear and determinative among the employees.[34]

It is settled law that an employer commits an unfair labor practice under section 8(a)(2) of the Act where it renders unlawful assistance to a union.[35] However, the Board has long held that not all employer assistance to a union may be sufficient to hold an employer in violation of the Act.[36] Thus, there have been cases where the union's use of company time and property, provided by the employer, did not establish a *per se* unfair labor practice.[37] In finding such a violation the U.S. Supreme Court has observed that there must be an inference that the employer's assistance denied the employees their right to complete and unhampered freedom in choosing a bargaining representative, without regard to their employer's wishes.[38] Each case must be judged according to its own particular facts.[39]

The principle enunciated in *International Association of Machinists, supra*, should apply here with even greater force where the facts warrant its application, given Local 32B's extensive history and then incumbency as the employee's exclusive bargaining representative, which entitled it to a rebuttable presumption of continued majority representative status.

In *International Association of Machinists* the Supreme Court held that the employer's actions, namely, (1) his statements to an employee that there could possibly be a layoff if the CIO were voted in, and (2) his allowing active solicitation on behalf of the existing union, the A.F. of L. on company time, unlawfully assisted the A.F. of L. and thereby interfered with the employee's freedom of choice. The employer had made "slight suggestions" as to his choice between unions and his preference was enough to have a "telling effect among men who know the consequences of incurring the employer's strong displeasure."[40]

Respondent's conduct at the February 14 meeting, arranged by its agent, held on company time and at one of its buildings, and at which employees saw its attorney in the presence of Local 2's president, and where they received an appeal to convert to Local 2, with the promise of aid by the attorney and an appeal by Local 2's president as well, and knowing the employer's sentiments against agreeing to the terms offered by Local 32B, constitutes a related series of acts of assistance in violation of Section 8(a)(2) of the Act totally tainting Local 2's later card solicitation and bargaining demand and making it impossible to raise a question concerning representation.[41]

Finally, I must deal with attorney Katz' November 9, 1981, letter to Region 29 of the Board. One might argue that in the face of Mallouk's and Gerstein's denials of having met or negotiated an agreement, Katz' written assertions to the Region lack credibility and should not be affirmed. Recall, however, Mallouk's testimony that he did not know whether Katz had himself engaged in negotiations with Local 2.[42] Furthermore, at least one known Local 2 agent other than Gerstein, Secretary-Treasurer Smolky, who did not testify, was available for such negotiations. On balance, I conclude that in the absence of any explanation by the writer of the letter, attorney Katz, who chose not to testify, the weight of the evidence supports the conclusion as announced in the letter, that representatives of Respondent and Local 2 met and negotiated an agreement which was submitted to the Employer for ratification and was about to be signed. These words warrant the inference that at the point the agreement had been negotiated Respondent had indeed granted recognition to Local 2, whether orally or by written instrument being unclear. This conduct constitutes another aspect of Respondent's unlawful assistance to Local 2 and refusal to bargain with Local 32B.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 32B and Local 2 are labor organizations within the meaning of Section 2(5) of the Act.

3. All superintendents, porters and handymen employed by Respondent at all buildings managed by Respondent in the Borough of Brooklyn, City and State of New York, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, Local 32B has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By warning and directing its employees to refrain from becoming or remaining members of Local 32B or from providing any assistance or support to Local 32B

[34] Respondent had, by February 14, 1980, already given ground for employee belief that some other union, Local 2 in fact, was preferred to Local 32B by their employer. Even without such earlier conduct, employee sentiment expressed against engaging in a strike falls far short of providing sufficient objective evidence that Local 32B no longer represented a majority of Respondent's work force. Even with the Employer's February 14 support, Local 2 designation cards were not executed until 4 months had elapsed.

[35] *Longchamps, Inc. and its wholly owned subsidiary, S & B Restaurant of Huntington, d/b/a Steak and Brew of Huntington*, 205 NLRB 1025, 1031 (1973).

[36] *Id.*

[37] *Coamo Knitting Mills, Inc.*, 150 NLRB 579, 582 (1964); *Jolog Sportswear Inc. and Jonathan Logan, Inc.*, 128 NLRB 886, 888-889 (1960).

[38] *Internatinal Association of Machinists; Tool and Die Makers Lodge No. 35, etc.* v. *N.L.R.B.*, 311 U.S. 72 (1940).

[39] *Longchamps Inc., supra* at 1031.

[40] *International Association of Machinists, id.* See also *World Wide Press, Inc.*, 242 NLRB 346 (1979), where the employer provided work time for the employees to meet to revive a company created union and to select committee members in the face of an organizing campaign by the I.T.U. and stated he "might not be able to pay union scale" and "the plant might have to shut down." As stated by Administrative Law Judge William J. Parmier III, quoting *N.L.R.B.* v. *Edwin D. Wemyss d/b/a Coca Cola Bottling Company of Stackton*, 212 F.2d 465 at 471 (9th Cir. 954), and affirmed by the Board. "They knew their employer desired it and feared the consequences if they did not [support OWWPIE]." *Id.* at 364.

[41] Each of the cases Respondent cites in its brief at pp. 7 and 8 for the proposition that Mallouk and Katz' statements to employees are protected by Sec. 8(c) of the Act are inapposite. None deal with statements of the nature of the threats, inducements to switch unions, and announcements of adamant refusal to consider or counter the Union's demands, which characterize the record in this case.

[42] On one other occasion, according to Mallouk, he learned of Katz' acting for Respondent, at the February 14 meeting, but failed to countermand or revoke his attorney's authority to act or speak on Respondent's behalf.

and by threatening its employees with discharge and loss of employment if they signed a petition in favor of Local 32B otherwise provided support to Local 32B Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By engaging in the conduct enumerated above, convening meetings of its employees during work hours on its premises at which it urged and directed its employees to become members of and give support to Local 2, granting recognition to and bargaining with Local 2 as the exclusive collective-bargaining representative of its employees in the appropriate unit enumerated above at a time when Local 2 did not represent an uncoerced majority of the unit employees and when Local 32B continued to enjoy status as exclusive bargaining representative of the unit employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

7. By engaging in the conducted enumerated above, unilaterally changing existing wage rates and other terms and conditions of employment; without providing notice to Local 32B and without affording it an opportunity to negotiate and bargain with it concerning such changes; negotiating in bad faith and with no intention of entering into any final or binding collective-bargaining agreement with Local 32B; refusing and continuing to refuse to negotiate with Local 32B, specifically concerning wages and effective dates for a new contract, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Respondent shall be ordered to cease and desist from engaging in the unfair labor practices found. Affirmatively, Respondent shall be ordered to bargain on request with Local 32B and, if an understanding is reached, embody it in a signed document. The date from which the obligation to bargain shall commence shall be April 21, 1979, the date on which the last contract between Respondent and Local 32B expired, and from which bargaining for a renewed agreement commenced, and the earliest date on which Respondent committed an unfair labor practice by retroactively making salary improvements without notice to Local 32B payable from that date.[43] Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting wage increases, I shall recommend that Respondent shall not be required to rescind or discontinue the wage increases or other benefits which it has unlawfully effectuated. It would serve no remedial or preventive purpose to deny employees benefits which they are enjoying. The Board's general practice permits continuance of beneficial change made unilaterally by the employer in violation of the Act.[44]

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[45]

The Respondent, Elias Mallouk Realty Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Warning and directing its employees to refrain from becoming or remaining members of Local 32B-32J, Service Employees International Union, or from providing any assistance or support to that labor organization and threatening its employees with discharge or loss of employment if they sign a petition in favor of the aforementioned labor organization or otherwise provide support to it.

(b) Convening meetings of its employees during work hours on its premises at which it urges and directs its employees to become members of and give support to Local 2, New York State Federation of Independent Union, or any other labor organization, and granting recognition to and bargaining with Local 2 as the exclusive representative of its employees in an appropriate unit at a time when said labor organization does not represent an uncoerced majority of its employees in said unit and when Local 32B-32J continues to enjoy status as exclusive representative of its employees in said unit.

(c) Refusing to recognize and bargain collectively with Local 32B-32J, Service Employees International Union, as the exclusive collective-bargaining representative of its employees in the following appropriate unit.

> All superintendents, handymen and porters employed by the employer at all buildings managed by it in the Borough of Brooklyn, city and State of New York.

(d) Announcing or granting unilateral wage increases or announcing, granting, or increasing other employee benefits to its employees represented by Local 32B-32J in the appropriate bargaining unit described above. Nothing herein shall require the Employer to rescind or discontinue the salary increase previously granted by it to the aforementioned employees.

---

[43] Cf. *Trading Port, Inc.*, 219 NLRB 298 (1975); *Drug Package Company, Inc.*, 228 NLRB 108 (1977). The principle enunciated in *Trading Port* should be as applicable to a refusal to bargain with an incumbent union as it is in an initial bargaining context, particularly where, as here, the Employer's conduct has unduly and unlawfully delayed the commencement of bargaining free from unfair labor practices which have interfered with the employees' exercise of Sec. 7 rights.

[44] *M.A. Harrison Manufacturing Company, Inc.*, 253 NLRB 675, 687 (1980). It is noted that Local 32B has not requested at the hearing, or in its brief, that it be given the option to request revocation of the increases. It is also noted that the General Counsel's allegation of unilateral change is limited to wages and does not apply to failure to remit union dues or any other changes in terms or conditions of employment or the status of Local 32B contained in the expired 1979 agreement.

[45] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize effective from the date beginning April 21, 1979, and, upon request, bargain collectively with Local 32B-32J as the exclusive representative of its employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Garden City, New York, place of business copies, in English and Spanish,[46] of the attached noticed marked "Appendix."[47] Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed as to those allegations relating to the alleged supervisory status of Superintendents Deteskey and Demmet and Respondent's responsibility for their actions on the basis of such alleged supervisory status not specifically found to be violative of the Act.

[46] It appears that a number of the handymen and porters are Spanish speaking, and, accordingly, the notice should be printed as well in the language in which they are fluent and most comfortable.

[47] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."